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Docket No.

OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

STATE OF WISCONSIN,

Respondent,

-vs-

MARTY S. MADEIROS,

Petitioner.

On Writ of Certiorari to the
Supreme Court of the State of Wisconsin

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

Christopher A. Mutschler
State Bar No. 1017494
Counsel of Record
ANDEREGG & MUTSCHLER, LLP
845 South Main Street, Suite 120
Fond du Lac, WI 54935
Telephone 920.921.9299
Facsimile 920.921.9463

52P.

QUESTION PRESENTED FOR REVIEW

WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION PROHIBITS THE SIMULTANEOUS PROSECUTION OF TWO OFFENSES WHICH ARE PROVED BY THE SAME EVIDENCE AND WHICH ARISE OUT OF ONE COURSE OF CONDUCT?

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CITATION OF OPINIONS AND ORDERS ENTERED

Wisconsin Supreme Court Order:

State of Wisconsin v. Marty S. Madeiros, (Wis. Sup. Ct. Table of Dispositions, 2001). (See Appendix A.)

Wisconsin Court of Appeals Decision:

State of Wisconsin v. Marty S. Madeiros, Unpub. Slip Op. No. 00-2600-CR (Dated March 29, 2001). (See Appendix B.)

Trial Court Judgment of Conviction:

State of Wisconsin v. Marty s. Madeiros, Case No. 99-CT-2284 (Dane County Circuit Court, June 28, 2000). (See Appendix C.)

STATEMENT OF JURISDICTION

The order from which the petitioner seeks review was entered on July 18, 2001. There have been no rehearings or extensions of time to file this petition.

The petitioner believes this Court's jurisdiction to review on a writ of certiorari the order in question is conferred by 28 U.S.C. §§ 1257(a).

This Petition calls into question the constitutionality of simultaneously prosecuting an individual for committing elementally identical crimes which arise under one state statute, namely WIS. STAT. § 346.63(1) (2000). Accordingly, 28 U.S.C. § 2403(b) may apply. Therefore, three copies of this Petition will be served upon the Attorney General for the State of Wisconsin.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

WIS. STAT. § 340.01(46m) (2000):

Words and phrases defined. In s. 23.33 and chs. 340 to 349 and 351, the following words and phrases have the designated meanings unless a different meaning is expressly provided or the context clearly indicates a different meaning:

(46m) "Prohibited alcohol concentration" means one of the following:

(a) If the person has one or no prior convictions, suspensions or revocations, as counted under s. 343.307 (1), an alcohol concentration of 0.1 or more.

(b) If the person has 2 prior convictions, suspensions or revocations, as counted under s. 343.307 (1), an alcohol concentration of 0.08 or more.

(c) If the person has 3 or more prior convictions, suspensions or revocations, as counted under s. 343.307 (1), an alcohol concentration of more than 0.02.

WIS. STAT. § 343.305(5)(d) (2000):

At the trial of any criminal or civil action or proceeding arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while under the influence of an intoxicant, a controlled substance, a controlled substance analog or any other drug, or under the influence of any combination of alcohol, a controlled substance, a controlled substance analog and any other drug, to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which

renders him or her incapable of safely driving, or having a prohibited alcohol concentration, or alleged to have been driving or on duty time with respect to a commercial motor vehicle while having an alcohol concentration above 0.0 or possessing an intoxicating beverage, regardless of its alcohol content, or within 4 hours of having consumed or having been under the influence of an intoxicating beverage, regardless of its alcohol content, or of having an alcohol concentration of 0.04 or more, the results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant, a controlled substance, a controlled substance analog or any other drug, or under the influence of any combination of alcohol, a controlled substance, a controlled substance analog and any other drug, to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving or any issue relating to the person's alcohol concentration. Test results shall be given the effect required under s. 885.235.

WIS. STAT. § 346.63(1)(a)-(c) (2000):

Operating under the influence of intoxicant or other drug. (1) No person may drive or operate a motor vehicle while:

(a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or

(b) The person has a prohibited alcohol concentration.

(c) A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of par. (a) or (b) or both for acts arising out of the same incident or occurrence. If the person is charged with violating both pars. (a) and (b), the offenses shall be joined. If the person is found guilty of both pars. (a) and (b) for acts arising out of the same incident or occurrence, there shall be a single convictions for purposes of sentencing and for purposes of counting convictions under ss. 343.30(1q) and 343.305. Paragraphs (a) and (b) each require proof of a fact for conviction the other does not require.

WIS. STAT. § 885.235(1g) (2000):

(1g) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration while operating or driving a motor vehicle or, if the vehicle is a commercial motor vehicle, on duty time, while operating a motorboat, except a sailboat operating under sail alone, while operating a snowmobile, while operating an all-terrain vehicle or while handling a firearm, evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect:

1. The fact that the analysis shows that the person had an alcohol concentration of more than 0.0 but less than 0.08 is relevant evidence on the issue of being under the combined influence of alcohol and a controlled substance, a controlled substance analog or any other drug, but, except as provided in par. (d) or sub. (1m), is not to be given any prima facie effect.

2. The fact that the analysis shows that the person had an alcohol concentration of more than 0.0 but less than 0.1 is relevant evidence on the issue of being under the combined influence of alcohol and a controlled substance, a controlled substance analog or any other drug but, except as provided in par. (d) or sub. (1m), is not to be given any prima facie effect.

(b) Except with respect to the operation of a commercial motor vehicle as provided in par. (d), the fact that the analysis shows that the person had an alcohol concentration of more than 0.04 but less than 0.1 is relevant evidence on the issue of intoxication or an alcohol concentration of 0.1 or more but is not to be given any prima facie effect.

(bd) Except with respect to the operation of a commercial motor vehicle as provided in par. (d), the fact that the analysis shows that the person had an alcohol concentration of more than 0.04 but less than 0.08 is relevant evidence on the issue of intoxication or an alcohol concentration of 0.08 or more, but is not to be given any prima facie effect.

(c) The fact that the analysis shows that the person had an alcohol concentration of 0.1 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.1 or more.

(cd) In cases involving persons who have 2 or more prior convictions, suspensions or revocations, as counted under s. 343.307 (1), the fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more.

(d) The fact that the analysis shows that the person had an alcohol concentration of 0.04 or more is prima facie evidence that he or she was under the influence of an intoxicant with respect to operation of a commercial motor vehicle and is prima facie evidence that he or she had an alcohol concentration of 0.04 or more.

STATEMENT OF THE CASE

The Petitioner, Marty S. Madeiros, was charged in Dane County, Wisconsin, with both Operating a Motor Vehicle While Intoxicated-Second Offense, contrary to WIS. STAT. § 346.63(1)(a) (2000), and Operating a Motor Vehicle With a Prohibited Alcohol Concentration-Second Offense, contrary to WIS. STAT. § 346.63(1)(b) (2000).

The foregoing charges arose when Trooper Lee Bloomquist of the Wisconsin State Patrol, while on routine patrol in the County of Dane, noticed a vehicle approaching rapidly in his rearview mirror at a rate of speed which appeared to be above the legal limit. This vehicle was being operated by the Petitioner, Marty S. Madeiros.

Trooper Bloomquist stopped Mr. Madeiros' vehicle, and upon making contact with Mr. Madeiros, Trooper Bloomquist noticed an odor of intoxicants emanating from vehicle. Trooper Bloomquist asked Mr. Madeiros to exit the vehicle to perform some field sobriety tests. Mr. Madeiros complied with the trooper's request. According to Trooper Bloomquist, Mr. Madeiros failed the field sobriety tests, and thereupon, Trooper Bloomquist arrested him for Operating a Motor Vehicle While Intoxicated. (See Appendix B.)

Mr. Madeiros was transported from the scene of his detention to Meriter Hospital in the City of Madison, Wisconsin, where Trooper Bloomquist sought to obtain a sample of Mr. Madeiros' blood pursuant to Wisconsin's Implied Consent Law by reading the Informing the Accused Form to Mr. Madeiros. According to Trooper Bloomquist, when asked whether he would submit to a blood test, Mr. Madeiros refused to respond. Thereafter, a hospital technician entered the room. The technician asked Mr. Madeiros whether he would sign the

hospital's form to consent to the procedure. Mr. Madeiros, while refusing to sign the hospital's form, did consent to the technician's request to have the samples withdrawn. Analysis of Mr. Madeiros' blood sample yielded a result above the legal limit, and Mr. Madeiros was charged with Operating a Motor Vehicle With a Prohibited Alcohol Concentration. (See Appendix B.)

Prior to trial in his case, Mr. Madeiros filed several motions. Among these motions was a motion which alleged that Mr. Madeiros' right to be free from twice being tried for the same offense under the Double Jeopardy Clause of the U.S. Constitution was violated by Wisconsin's drunk driving prosecution scheme. More specifically, Mr. Madeiros alleged that a scheme which allows the State to obtain convictions on each of the two offenses with which he was charged by proving but a single fact in both cases—namely, that he had a prohibited alcohol concentration—violated his double jeopardy rights because it relieved the State of its burden to prove anything elementally different or distinguishable between the two alleged violations..

On March 10, 2000, a hearing on Mr. Maderios' motions was held before the Circuit Court for Dane County, the Honorable William Foust presiding. Judge Foust denied all of Mr. Madeiros' motions.

After his motions were denied, Mr. Madeiros plead No Contest to both Operating a Motor Vehicle While Intoxicated-Second Offense and Operating a Motor Vehicle With a Prohibited Alcohol Concentration-Second Offense, after which he was found guilty on both counts and sentenced to a period of incarceration. (See Appendix C.)

On July 13, 2000, Mr. Madeiros filed a Notice of Intent to Pursue Post-Conviction Relief with the clerk of circuit court. By Notice filed September 25, 2000, Mr. Madeiros commenced an appeal to the Wisconsin Court of Appeals.

During the pendency of Mr. Madeiros' appeal, the Wisconsin Court of Appeals issued a decision in *State v. Raddeman*, 2000 WI App. 190, 238 Wis. 2d 628, 617 N.W.2d 258, which seemingly disposed of the question raised in Mr. Madeiros' appeal on the same topic. In an effort to preserve his issue on appeal, Mr. Madeiros alleged in his appeal that the *Raddeman* decision failed to adequately address the issue raised in his case, and therefore, he posited that a critical reexamination of the *Raddeman* decision by the court of appeals was appropriate.

The court of appeals declined to reevaluate *Raddeman*, and concluded that because the *Raddeman* decision held that the double jeopardy clause was not violated by a prosecuting someone for two crimes which are proved by exactly the same evidence, Mr. Madeiros' conviction had to be affirmed. The court of appeals' decision was dated and released March 29, 2001. (See Appendix B.)

After the Wisconsin Court of Appeals declined to overturn his conviction, Mr. Madeiros next timely filed a petition for review with the Wisconsin Supreme Court. In his petition for review, Mr. Madeiros analyzed the court of appeal's decision in *Raddeman*, and argued that the *Raddeman* court reached the incorrect conclusion because it failed to consider certain arguments and authority that Mr. Madeiros raised in his brief (and which are also presented *infra*).

The Wisconsin Supreme Court declined to accept review of Mr. Madeiros' case, and by an order dated and released July 18, 2001, said as much. (See Appendix A.)

It is from the Wisconsin Supreme Court's decision to decline to accept jurisdiction over Mr. Madeiros' double jeopardy question that Mr. Madeiros now petitions this Court for review.

ARGUMENT

I. THE DOUBLE JEOPARDY CLAUSE IS VIOLATED WHEN A PERSON IS PROSECUTED FOR BOTH OPERATING WHILE INTOXICATED AND OPERATING WITH A PROHIBITED ALCOHOL CONCENTRATION BECAUSE THE STATUTORY PRESUMPTION WHICH PERMITS A JURY TO BASE A FINDING OF INTOXICATION SOLELY UPON EVIDENCE OF THE ACCUSED'S ALCOHOL CONCENTRATION ALLOWS EACH OFFENSE TO BE PROVED BY THE SAME EVIDENCE, THEREBY RELIEVING THE STATE OF ITS BURDEN TO PROVE THAT SEPARATE OFFENSES WERE COMMITTED.

A. The Constitutional Underpinnings of the Double Jeopardy Clause.

The Fifth Amendment to the United States Constitution provides in pertinent part that "[n]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb; . . . . " The prohibition against twice being put in jeopardy of life or limb—also known as "double jeopardy"—"has deep roots in [American] history and jurisprudence." *United States v. Halper*, 490 U.S. 435, 440 (1989). Because notions of the prohibition against double jeopardy pre-date the drafting of our Federal Constitution, it is numbered among the bedrock constitutional rights. *See generally, id.*. The double Jeopardy Clause is made applicable to the States through the Fourteenth Amendment to the U.S. Constitution. *See* U.S. CONST. amend. XIV, § 1.

Underlying the Double Jeopardy Clause is a principle of paramount importance which has, ostensibly, elevated the Clause to the nearly sacred status it enjoys among the rights guaranteed by the Bill of Rights. The principle to which Mr. Madeiros alludes is this: the Clause serves to protect citizens "against repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty, even though innocent." *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980). This most fundamental of rights "guarantees that the State shall not be permitted to make repeated attempts to convict [a person]." *United States. v. Wilson*, 420 U.S. 332, 343 (1975). The knowledge that the State will not be permitted to bring repeatedly to bear its nearly unlimited resources to attack or wear down the individual until it achieves the end it desires is of great comfort in a free society because it ensures fundamental fairness in the judicial process.

B. The Test Employed to Determine Whether There Exists a Violation of the Fifth Amendment's Prohibition Against Double Jeopardy.

At its heart, the fifth amendment's prohibition against double jeopardy was designed to guard against a person (a) being prosecuted for the same offense a second time after acquittal; (b) being prosecuted for the same offense a second time after conviction; and (c) twice being punished for the same crime. *North Carolina v. Pearce*, 395 U.S. 711 (1969).

In *United States v. Dixon*, 509 U.S. 688 (1993), this Court observed that "[i]n both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the double

jeopardy bar applies." *Id.* at 696.

The "same-elements" test to which the *Dixon* Court referred is also known by the alias, "the *Blockburger* test." The *Blockburger* test requires the court to examine whether the each of the crimes charged contains an element which is not contained in the others. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). If it is established that the scrutinized offense does not have an additional or different element than other offenses to which it is being compared, double jeopardy bars prosecution because the offenses are deemed to be "the same." *Id.* As Mr. Madeiros will demonstrate below, application of the *Blockburger* test to the facts of his case demonstrates that the State has taken unfair advantage of the provisions found in secs. 346.63(1)(a)—Wisconsin's operating while intoxicated [hereinafter OWI] statute—and (1)(b)—the operating with a prohibited alcohol concentration [hereinafter PAC] statute—by relieving itself of the burden to have to prove anything elementally different under subsection (1)(a) relative to what it must prove under subsection (1)(b).

C. Description of the Double Jeopardy Problem.

A comparative examination of WIS. STAT. § 346.63(1)(a) and (b), reveals that they require proof of the following elements, *i.e.*, that the defendant:

Section 346.63(1)(a) [OWI]:

(a) drove or operated
(b) a motor vehicle
(c) on a public highway
(d) while under the influence of an intoxicant

Section 346.63(1)(b) [PAC]:

(a) drove or operated
(b) a motor vehicle
(c) on a public highway
(d) with a prohibited alcohol concentration

At first blush, it appears that an elemental difference between these charges exists and lies within the fourth element which must be proved for each crime. If this superficial examination was all the farther the *Blockburger* inquiry was required to take this Court, it seems that the PAC charge requires proof of something different than the OWI charge, and therefore, the prohibition against double jeopardy would not apply.

In fact, recognition of this superficial difference has even been codified in sec. 346.63(1)(c), which provides that "[p]aragraphs (a) and (b) each require proof of a fact for conviction which the other does not require." The ostensible justification for the Wisconsin legislature's decision to codify this observation must have been its concern that the two offenses seemed very similar, and therefore, may be subject to a double jeopardy challenge. Unfortunately, however, the legislature's prophylactic codification of the alleged difference does not withstand constitutional muster in light of the presumptions associated with a chemical test gathered pursuant to Wisconsin's Implied Consent law.

The Implied Consent Law provides in sec. 343.305(5) that a chemical test gathered from an accused driver is entitled to the presumptions found in sec. 885.235. Section 885.235(1g)(c) provides:

> The fact that the analysis shows that the person had an alcohol concentration of 0.1 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.1

In practice, this presumption is implemented in the standard Wisconsin Jury Instruction given for this offense, which provides in pertinent part:

> Evidence has been received that, within three hours after the defendant's alleged driving a motor vehicle, a sample of the defendant's breath [or blood, when appropriate] was taken. An analysis of the sample has also been received. If you are satisfied beyond a reasonable doubt that there was .10% or more by weight of alcohol in the defendant's blood at the time the test was taken, **you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged driving** or that the defendant had a prohibited alcohol concentration at the time of the alleged driving or both, but you are not required to do so.

Wis. JI—Criminal 2669 (1996)(emphasis added).

Based upon the foregoing language, the jury is told that it may convict the accused on the OWI charge not by looking for independent proof of a *different* element than that found in the PAC allegation, but rather, the jury is instructed that it may "carry over" its finding on the PAC charge to the OWI charge and assess guilt thereon with entirely the *same* evidence. Thus,

the apparent distinction noted in sec. 346.63(1)(c) is utterly disingenuous in practice. If proof of different facts was truly required, the jury should not be instructed that it "may find from [the] fact [of the PAC] alone that the defendant was under the influence of an intoxicant . . . . "

That the equating of the OWI and PAC charges raises serious double jeopardy concerns is not an imagined phantom. The Wisconsin Jury Instruction Committee recognized the same problem when, reflecting upon the OWI/PAC dichotomy, it commented that "the **same conduct** is involved in each count and [is] proven by the **same evidence**." Introductory Comment, Wis. JI-Criminal 2660-2665, at 10 (1986)(emphasis added). (See Appendix D.) The Wisconsin jury Instruction Committee's insight is, in fact, so keen that it is worth quoting at length here:

> [T]he statutes specifically authorize the prosecutor to charge both bases of liability for a single act of operating. . . . ***Such provisions raise double jeopardy questions and some practical difficulties.***
>
> The statutes authorizing multiple prosecutions assume that both charges be submitted to the jury, apparently require that the jury return verdicts on each charge, and specifically provide that in such a case there is to be but a single conviction for purposes of sentencing and counting convictions. By placing the limits on sentencing and counting convictions (at least on counting convictions for purposes of the Motor Vehicle Code), the statute ***may*** avoid the ***most obvious*** problems under the double jeopardy clause. The usual inquiry is whether multiple punishments are possible, and these

statutes avoid multiple punishment. But the fact remains that the statutes specifically acknowledge that a jury could return two verdicts of guilty for a single act of operating while intoxicated: one finding the defendant guilty of operating under the influence; one finding the defendant guilty of operating with a blood alcohol concentration of .10% or more.

It can be argued that allowing two guilty verdicts in such a situation raises serious double jeopardy concerns even if the two findings are treated as one for purposes of sentencing. Unfortunately, the guidelines for responding to these double jeopardy concerns are less than clear. . . .

. . .

The Committee recommends that whenever the evidence clearly indicates that one theory of liability is more applicable than the other, only one charge be submitted [to the jury]. Prosecutors should be urged to submit only the strongest of the two cases. This is desirable for the additional reason that if two counts are submitted and only one guilty verdict is returned, the verdicts may appear inconsistent. While such verdicts are not likely to affect the validity of a conviction on one count, it is difficult to explain why the jury could reach such a result when ***the same conduct is involved in each count and would be proven by the same evidence.***

Introductory Comment, Wis. JI-Criminal 2660-2665, at 6-10 (1986)(emphasis added).

It is the Petitioner's position that the "carry over" method of proving the OWI charge violates due process prohibitions against double jeopardy under the *Blockburger* test. Applying the *Blockburger* test to the facts of this case yields the following results.

First, it is beyond dispute that the first three elements of the crime of operating while intoxicated are identical in every respect with the first three elements of operating with a prohibited alcohol concentration. Each of the two crimes requires that the accused (1) drove or operated; (2) a motor vehicle; (3) on a public highway.

Second, it is also evident that there exist no other elements to the two crimes than their respective fourth elements. Thus, one crime does not have "more" elements than the other.

Finally, it is also undisputable that both WIS. STAT. § 885.235(1g) and the substantive jury instruction for the offenses permits the jury to find that the State has proved the fourth element of the OWI charge—that the accused was "under the influence of an intoxicant"—by solely proving the fourth element of the PAC charge, *i.e.*, the accused had a prohibited alcohol concentration. The jury is instructed that it "may find from that fact alone" that the accused was under the influence of an intoxicant. The presumption and instruction have the practical effect of eliminating any difference between the two offense which might at first blush have existed, and as such, puts the accused in jeopardy of having to simultaneously wage a war against two identical charges. This is a condition which should not easily be tolerated under the rubric of the fifth amendment. The *Blockburger* test has thus been satisfied.

If the jury returns a verdict of guilty on both the OWI and PAC charges, the fact that there shall be but one conviction for purposes of sentencing according to sec. 346.63(1)(c) does not remedy the problem created by permitting the defendant to be tried on both. The prejudice to the defendant does not lie in the act of sentencing, but rather, it lies in the prejudice which exists during a trial at which the defendant must defend him or herself against two identical charges. As noted above, the Double Jeopardy Clause was specifically designed to prevent the State from having "repeated attempts at conviction" as the foregoing analysis demonstrates it has in a dual OWI/PAC prosecution. *See United States. v. Wilson*, 420 U.S. 332, 343 (1975). Likewise, the Double Jeopardy Clause was also designed to protect the accused against the "embarrassment, expense, anxiety, and insecurity" which is attendant to having to defend oneself against repeated prosecution for the same offense, as occurs when the State tries a person for both OWI and PAC. *See United States v. DiFrancesco*, 449 U.S. 117, 136 (1980).

Sound jurisprudence would not allow an alleged speeder to be tried for the act of "speeding" *and*, arising out of the same incident, the act of "driving above a prohibited limit" as evidenced by the value on the radar gun. Permitting the "dual prosecution" in this example offends notions of fundamental fairness. Thus, the prosecution in this case should not likewise be allowed to try a person for drunk driving *and* driving with a prohibited alcohol concentration when the only difference in elements between the two is eliminated by the presumption in sec. 885.235, thereby rendering them to be the *same* offense.

D. Distinguishing State v. Raddeman.

In Wisconsin, the double jeopardy question raised by Mr. Madeiros in this petition is seemingly disposed of in *State v. Raddeman*, 2000 WI App. 190, 238 Wis. 2d 628, 617 N.W.2d 258.

The *Raddeman* court rejected the double jeopardy issue raised by Mr. Raddeman because it did not concur with his reading of the Wisconsin Supreme Court's holding in another case, namely *State v. Bohacheff*, 114 Wis. 2d 402, 338 N.W.2d 466 (1983). According to the *Raddeman* court, the double jeopardy question Raddeman raised was easily disposed because, the tribunal concluded, the only right which could be adversely affected by dual OWI/PAC prosecution was the prohibition against twice being punished for the same thing. The *Raddeman* court characterized the issue this way:

> We begin with Raddeman's double jeopardy issue. Double jeopardy protects against: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *See id.* at 407. Here, Raddeman had not previously been acquitted or convicted of either charge so the first two protections afforded by double jeopardy are not implicated. Thus, the issue narrows to the third protection against double jeopardy-whether the State's dual prosecution constitutes multiple punishments for the same offense.
>
> In *Bohacheff*, the supreme court addressed this aspect of double jeopardy protection. There, Bohacheff was dually

> charged with causing great bodily harm by operation of a motor vehicle while under the influence of an intoxicant and with a blood alcohol concentration of 0.1% pursuant to Wis. Stat. §940.25(1)(a) and (b) (1981-82). *See Bohacheff*, 114 Wis. 2d at 404. Bohacheff argued that the dual prosecution violated his double jeopardy protections. *See id* at 404-05. The supreme court disagreed. The court held that "the complaint does not violate double jeopardy protections because the statute subjects the defendant to only one conviction and one punishment." *Id.* at 405.

Raddeman, 2000 WI App 190, ¶¶4-5 (citations omitted). The Petitioner in this case disagrees with the *Raddeman* court that the issue presented for review herein is as narrow as the *Raddeman* court framed it.

Mr. Madeiros contends that the Double Jeopardy Clause was intended to protect an accused from *simultaneous* prosecution for the same offense as a penumbra or emanation of the first two protections the Clause affords, namely, prohibitions against twice being prosecuted for the same crime after either acquittal or conviction. Mr. Madeiors is *not* contending that the third protection referred to by the *Raddeman* court is implicated herein.

In order to make it clear to this Court what exactly it is that Mr. Madeiros is attempting to distinguish about the *Raddeman* case, it is perhaps best to do so *vis a vis* illustration. In its most simple terms, Mr. Madeiros is asserting that any court of competent jurisdiction would find it constitutionally impossible to permit a person to be simultaneously prosecuted for two counts of burglary arising out of a single occurrence in

which the accused broke into only one home; three counts of fraud under one statute for the exact same *single* transaction; four counts of homicide for murdering the one person; *et al.*.

Certainly, it must be conceded, as the *Raddeman* court concluded, that there are *not* two punishments arising out of the dual charges of OWI/PAC, thanks in large measure to the language found in sec. 346.63(1)(c). Acknowledging this fact, however, does not close the door on an underlying double jeopardy question which concerned the Wisconsin Jury Instruction Committee (*see supra*), and the Petitioner herein. The *Bohacheff* and *Raddeman* courts adopted a Machiavellian approach to the question which focused solely on the fact that since there was not going to be two punishments in the **end**, it did not matter that the accused was facing an uneven playing field in the **beginning** and **middle** of the prosecutorial process.

CONCLUSION

The Petitioner posits that the current practice of joining OWI and PAC charges for trial, when both offenses arise out of the same occurrence and are elementally identical due to the presumption in sec. 885.235, offends notions of due process. While Mr. Madeiros must concede that no double jeopardy case law is directly on point with the circumstances presented by a dual OWI/PAC prosecution, it does not necessarily follow that the Petitioner must also concede that double jeopardy protections are inapplicable in this context.

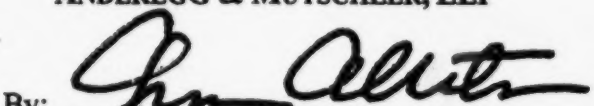
It is Mr. Madeiros' position that by rendering the fourth element of OWI proved by the same evidence which constitutes proof of the fourth element of PAC, any distinction which might have otherwise existed between these offenses becomes a "distinction without a difference." As such, it makes the prosecution of the Petitioner fundamentally unfair because it

forces him to accept the odds offered in a "Vegas parlor game" in which the house has unfairly stacked the deck. If the prosecution is to earn its conviction as due process requires, it should not do so through disguised duplications, but rather, by honestly compelling the jury to return a verdict which it establishes to be unavoidable through the admission of non-duplicitous proof.

Dated this 11th day of October, 2001.

Respectfully submitted:

ANDEREGG & MUTSCHLER, LLP

By: 

Christopher A. Mutschler
State Bar No. 1017494

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Office of the Clerk
SUPREME COURT
110 E. MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.courts.state.wi.us

To: July 18, 2001

Hon. William C. Foust
Dane County Circuit Court
210 Martin Luther King, Jr. Blvd.
Madison, WI 53709-0001

Christopher A. Mutschler
Anderegg & Mutschler, LLP
845 S. Main Street, Suite 120
Fond du Lac, WI 54935

Judith A. Coleman
Dane County Clerk of Courts
210 Martin Luther King, Jr. Blvd.
Madison, WI 53709

Jill Karofsky
Annemarie Leonardini Braun
Dane County Asst. Dist. Attys
210 M.L.K., Jr. Blvd., Rm 523
Madison, WI 53709-0001

Sally L. Wellman
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following order:

No. 00-2600-CR State v. Madeiros L.C.#99CT2284

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Marty S. Madeiros, and considered by the court,

IT IS ORDERED that the petition for erview is denied, without costs.

Cornelia G. Clark
Clerk of Supreme Court

COURT OF APPEALS

DECISION DATED AND FILED

March 29, 2001

Cornelia G. Clark

Clerk, Court of Appeals

of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* Wis. Stat. §§808.10 and Rule 809.62.

No. 00-2600-CR

STATE OF WISCONSIN IN COURT OF APPEALS

DISTRICT IV

State of Wisconsin,

Plaintiff-Respondent,

v.

Marty S. Madeiros,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: C.WILLIAM FOUST, Judge. *Affirmed.*

¶1. ROGGENSACK, J.[1] Marty Madeiros appeals his conviction for operating a motor vehicle while intoxicated (OMVWI) in violation of Wis. Stat. §§346.63(1)(a). He argues that: (1) the circuit court erred in finding that he had consented to have blood drawn for a chemical test and (2) permitting his prosecution for both OMVWI and operating a vehicle with a prohibited alcohol content (PAC) constitutes double jeopardy and a violation of his due process rights. Because Madeiros did not move to suppress the results of the blood test, we conclude that he waived any objection to the test results by pleading guilty to OMVWI. Additionally, we conclude that prosecuting Madeiros for both OMVWI and operating with a PAC does not constitute double jeopardy or violate his due process rights. Therefore, we affirm the judgment of the circuit court.

BACKGROUND

¶2. On September 18, 1999, Wisconsin State Trooper Lee Bloomquist arrested Madeiros based on probable cause to believe he was OMVWI. Bloomquist transported Madeiros to Meriter Hospital and read him the Informing the Accused form. Bloomquist twice asked Madeiros whether he would consent to a blood test, and Madeiros refused to respond. However, Madeiros did allow a hospital technician to withdraw blood. Analysis of the blood revealed a blood alcohol concentration of 0.233 percent.

¶3. Madeiros was charged with OMVWI and operating with a PAC, both as a second offense. Madeiros filed pretrial motions to preclude reliance on presumptions of automatic admissibility of the blood test results and to dismiss based on due process violations. The circuit court denied both motions. Madeiros then

pled guilty to OMVWI as a second offense. He appeals the denial of the motions and renews his double jeopardy contention.

DISCUSSION

Standard of Review.

¶4. We review allegations of due process and double jeopardy violations *de novo*. *State v. Evans*, 187 Wis. 2d 66, 82, 522 N.W.2d 554, 560 (Ct. App. 1994) (due process); *State v. Sauceda*, 168 Wis. 2d 486, 492, 485 N.W.2d 1, 3 (1992) (double jeopardy).

Blood Test.

¶5. Madeiros argues that the circuit court erred in finding that he had consented to having blood withdrawn for the purpose of chemical testing. As a result, he argues that the prosecution could not rely on the statutory presumptions concerning the admissibility of chemical test results.[2] We conclude that Madeiros's guilty plea waived this argument.

¶6. Generally, a guilty or no contest plea waives all non-jurisdictional defects and defenses. *State v. Kazee*, 192 Wis.2d 213, 219, 531 N.W.2d 332, 334 (Ct. App. 1995). However, a defendant may appeal from an order denying a motion to suppress evidence even though the judgment of conviction rests on a guilty or no contest plea. Wis. Stat. §§971.31(10); *State v. Riekkoff*, 112 Wis.2d 119, 126, 332 N.W.2d 744, 748 (1983).

¶7. In this case, Madeiros pled guilty to OMVWI (second offense) after the circuit court denied several motions. He had raised the issue of the automatic admissibility of the blood test results in a motion entitled "Motion To Preclude Reliance on Presumptions of Automatic Admissibility." Madeiros concedes

that the motion did not seek to suppress the results of the blood test. During the motion hearing, his attorney did not argue that the results of the blood test should be suppressed. Therefore, we conclude that his guilty plea constituted a waiver of his right to appeal the circuit court's denial of the motion.

Double Jeopardy.

¶8. Madeiros also argues that prosecuting him for both OMVWI and operating a vehicle with a PAC constitutes double jeopardy and violates his due process rights because the charges are based on the same course of conduct. He asks us to reconsider our decision in *State v. Raddeman*, 2000 WI App 190, 238 Wis.2d 628, 618 N.W.2d 258, which held that the dual prosecution procedure authorized by Wis. Stat. §§346.63(1)(c)[3] does not constitute double jeopardy or violate a defendant's due process rights. However, we may not overrule our own published decisions. *Cook v. Cook*, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997). Therefore, we conclude that prosecuting Madeiros for OMVWI and operating a vehicle with a PAC did not constitute double jeopardy or violate his due process rights.

CONCLUSION

¶9. Because Madeiros did not move to suppress the results of the blood test, we conclude that he waived any objection to the test results by pleading guilty to OMVWI. Additionally, we conclude that prosecuting Madeiros for both OMVWI and operating with a PAC does not constitute double jeopardy or violate his due process rights. Therefore, we affirm the judgment of the circuit court.

By the Court.-Judgment affirmed.

This opinion will not be published. Wis. Stat. Rule 809.23(1)(b)4.

1 This appeal is decided by one judge pursuant to Wis. Stat. §§752.31(2)(c). Additionally, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

2 Madeiros's argument appears to be based on the implied consent law, Wis. Stat. §§343.305(5)(d), which provides, in relevant part:

> At the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while under the influence of an intoxicant ... or having a prohibited alcohol concentration ... the results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant ....

He appears to be arguing that the results of his blood test are not presumed to be automatically admissible because the test was not administered within the parameters of the implied consent law. We do not address this argument because we conclude that he waived it by pleading guilty to OMVWI.

3 Wis. Stat. §§ 346.63(1)(c) reads, in relevant part:

> A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of par. (a) or (b) or both for acts arising out of the same incident or occurrence. If the person is charged with violating both

pars. (a) and (b), the offenses shall be joined. If the person is found guilty of both pars. (a) and (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions .... Paragraphs (a) and (b) each require proof of a fact for conviction which the other does not require.

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY

State v. Marty s. Madeiros

JUDGMENT OF CONVICTION AND SENTENCE TO THE COUNTY JAIL/FINE/FORFEITURE

Date of Birth: 02-13-1969

The defendant was found guilty of the following offense(s):

---

1 Operating while Intoxicated (2nd) 346.63(1)(a) Guilty Misd. U

Date(s) Committed 09-18-1999 Date(s)Convicted 06-28-2000

The defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence Length	Comments
1	06-28-2000	Alcohol Assessment	
1	06-28-2000	Forfeiture/Fine	Court authorized payment plan.

1	06-28-2000	Local jail	20 DA	w/huber. Court authorized service of sentence in another county jail if that county willing to accept him. **Begin date** 08-03-2000 **Begin time** 7:00 am **Agency** DCJ
1	06-28-2000	License revoked	16 MO	**Begin date** 06-28-2000

Obligation Detail:

Ct.	Schedule	Amount	Days to Pay	Failure to Pay Action
1	Misd DIS -	1039.00	60	Commitment

Obligation Summary:

Ct.	Fine	Court Costs	Other	Mand.	Victim Sur.	Total
1	625.00	360.00	4.00	50.00		1,039.00

Total Obligations:
1,039.00

It is adjudged that 0 days sentence credit are due pursuant to § 973.155 Wisconsin Statutes.

It is ordered that the Sheriff shall execute this sentence.

2660-2665 INTRODUCTORY COMMENT

Chapter 20, Laws of 1981 (the biennial budget bill), and Chapter 184, Laws of 1981,[1] made extensive changes in the Motor Vehicle Code and Criminal Code statutes relating to "operating while intoxicated."[2] These changes required the revision of seven previously published instructions[3] and the development of six new instructions.[4] This introductory comment, originally published in 1982, attempts to explain some of the major changes in the law relating to operating while intoxicated and identifies how the changes have been reflected in the jury instructions.[5] This comment was updated in 1985 to reflect additional legislative change[5.1] and case law developments.

I. A blood alcohol concentration of .10% or more as basis for liability.

Each statute relating to operating while intoxicated now provides two bases for liability: a) being under the influence, and b) having alcohol concentration of .10% or more.[6] The latter basis for liability is referred to in this discussion as the "status offense."

The creation of the "status offense" marks a different approach to relating the results of chemical tests to operating while intoxicated. For many years, Wisconsin followed a system used in several states which attached evidentiary significance to the results of chemical tests, recognizing the test results as relevant to the issue of being "under the influence," which was the sole basis for liability under the statue. Under the earliest version of this system, a test result showing a blood alcohol concentration of .15% or more was prime facie evidence that the person was under the influence; a test result showing between .05% and .15% was relevant evidence of

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intoxication; and a result of less than .05% was prima facie evidence that the person was not under the influence.[7] Later, the statute was modified to lower the .15% level to .10%.[8]

In 1978, the Wisconsin Legislature attempted to strengthen the effect of test results by providing, for Motor Vehicle Code offenses, that a result of .10% meant that the person was under the influence.[9] The intent was apparently to make the test result more than prima facie evidence of being under the influence, but in practical application, at least in criminal cases, the ultimate effect may have been about the same.[10]

The changes made by Chapter 20, Law of 1981, appear to take the issue to its final step: having .10% alcohol by weight in the blood is no longer merely evidentiary – it is made a basis for liability. This changes the nature of the method of proof in such cases. Formerly, the scientific fact (the amount of alcohol in the blood) was used, along with other evidence, to prove the defendant's condition at the time he operated the vehicle. Under the new system, the fact to be proved is the scientific fact: whether the defendant's blood had the required amount of alcohol in it at the time he operated the vehicle.

The constitutionality of the ".10%" basis for liability was upheld in State v. Muehlenberg, 118 Wis. 2d 502, 347 N.W.2d 914 (Ct. App. 1984). The statute was challenged on vagueness grounds, the argument being that a person could not determine by his own whether he was a "legal" .09% or an "illegal" .10%. The court held that a "person of common intelligence can, with a fair degree of definiteness, believe himself or herself to be in jeopardy of violating the statute if a significant quantity of alcohol has been consumed. . . . That is the point at which they are on notice – they have 'clear

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warning' that if they drive, they do so at their own risk." This provides the "fair notice" that due process requires.

This change has several effects on the trial of a case wherein the status offense is charged. First, it gives greater importance to the so-called "blood alcohol curve." This issue is discussed in greater detail below[11] and refers to the scientific fact that the absorption of alcohol by any single individual can vary a great deal, depending on such factors as body weight, physical and emotional condition, type of drink, etc. The issue is the extent to which a test result showing a certain blood alcohol concentration at a time after the operation of the vehicle is a reliable indicator that the blood alcohol concentration was at a certain level at the time of operation. The status offense presents this issue more starkly than the traditional method of using the scientific fact as one piece of evidence, usually along with others, to prove a more general fact – being under the influence.

Another issue raised by the status offense is whether evidence relating to the defendant's manner of driving, speech, coordination, etc., will be admissible on the issue of his blood alcohol concentration. Or is proof of blood alcohol concentration limited to evidence of test results? This question is the reverse of the situation under former law. Under former law, the scientific evidence was used to establish the offender's general condition. Under the new statutes, will evidence of general condition be admissible to prove the scientific fact?

The statutes specifically provide that evidence other than test results is admissible. Section 885.234(4), as amended, provides as follows:

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> (4) The provisions of this section relating to the admissibility of chemical tests for intoxication or blood alcohol concentration shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether or not a person was under the influence of an intoxicant or had blood alcohol concentration of 0.1% or more. . .

Despite the above statute, questions remain, especially regarding the relevance of nontest evidence to establish a specific blood alcohol concentration. The theory in support of admissibility would be that the evidence which formerly tended to prove that the defendant was under the influence remains relevant to prove the status because a person who slurs his speech, stumbles, or operates his vehicle in an erratic manner is likely to have a blood alcohol concentration of .10% or more. Is expert testimony required to make this connection? Section 885.235(4) allows the introduction of competent evidence remains. In the absence of further definition by statutes of appellate court decisions, it will be up to trial judges to decide what types of evidence are competent and relevant to the issue of the defendant's blood alcohol concentration at the time of the offense. Exert testimony would certainly assist the cour tin making these decisions.

II. The first offense/second offense distinction

The new penalty structure[12] or violations of § 346.63 retains the policy of prior law whereby a first offense is treated as a civil forfeiture, but a second and subsequent offense is punished as a crime (and with a mandatory jail sentence). This style of statutory drafting

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raises a number of questions:

1. May a second offense by charged as a forfeiture? The answer to this question is "no," according to County of Walworth v. Rohner, 108 Wis.2d 713, 324 N.W.2d 683 (1982).
2. May an uncounselled first offense be used as the basis for making a second offense as a crime? This question was answered affirmatively in State v. Novak, 107 Wis.2d 31, N.W.2d 364 (1981).
3. If a second offense is charged as a crime, and if there is no proof of the first offense, may a forfeiture be imposed in the criminal action? No reported decision had addressed this issue.
4. Is the fact of a prior offense an element the State must establish to a jury before a guilty verdict my be returned to a criminal charge?

The latter question is the one of the most immediate concern in the context of jury instructions and was decided by the Wisconsin Supreme Court just before this Comment was originally published. State v. McCallister. 107 Wis.2d 532, 319 N.W.2d 865 (1982). The instructions are based on the premise that the prior conviction is not an element which must be submitted to the jury. The same conclusion was reached by the court in McCallister.

III. Charging Two Theories of Liability

As discussed above (see Section I), a major feature of the new law relating to operating while intoxicated is the creation of the "status offense" as a basis for liability. The traditional "under the influence"

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basis is also retained under the new statutes, and the statutes specifically authorize the prosecutor to charge both bases of liability for a single act of operating. Thus, § 346.63(1)(c) provides:

> (c) A person may be charged with and a prosecutor my proceed upon a complaint based upon a violation of par. (a) or (b) or both for the acts arising out of the same incident or occurrence. If the person is charged with violating both pars. (a) and (b), the offenses shall be joined. If the person is found guilty of both pars. (a) and (b) for the acts of arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under §§ 343.30(1q) and 343.305. Paragraphs (a) and (b) each require proof of a fact for conviction which the other does not require.

The same provision appears in the other statutes relating to operating while intoxicated, see §§ 346.63(2)(a)2, 940.09(1)(c). Such provisions raise double jeopardy questions and some practical difficulties.

The statutes authorizing multiple prosecutions assume that both charges be submitted to the jury, apparently require that the jury return verdicts on each charge, and specifically provide that in such a case there is to be but a single conviction for purposes of sentencing and counting convictions. By placing the limits on sentencing and counting convictions (at least on counting convictions for purposes of the Motor Vehicle Code), the statute may avoid the most obvious problems under the double jeopardy clause. The usual inquiry is

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whether multiple punishments are possible, and these statutes avoid multiple punishment. But the fact remains that the statutes specifically acknowledge[13] that a jury could return two verdicts of guilty of a single act of operating while intoxicated: one finding the defendant guilty of operating under the influence; one finding the defendant guilty of operating with a blood alcohol concentration of .10% or more.

It can be argued that allowing two guilty verdicts in such a situation raises serious double jeopardy concerns even if the two findings are treated as one for purposes of sentencing. Unfortunately, the guidelines for responding to these double jeopardy are less than clear. The usual method of resolving double jeopardy questions requires that a court first look to the legislative intent.[14] In most of the cases that have received the attention of the U.S. Supreme Court, the legislative intent has not been clear and the Court has resorted to other principles to resolve the double jeopardy issue.[15] Under the new Wisconsin statutes relating to operating under the influence, ligislative intent could not be clearer: two findings of guilt are explicitly authorized.

Whether the double jeopardy clause of the U.S. Constitution can be offended when a legislature specifically allows multiple prosecutions is not made clear in the U.S. Supreme Court decisions which refer to the subject. Several recent decisions suggest that the double jeopardy clause does not limit what legislatures may do,[16] but the Court has not explicitly announced such a sweeping rule.[17]

The double jeopardy issue was addressed by the Wisconsin Supreme Court in State v. Bohacheff, 114 Wis.2d 402, 338 N.W.2d 446 (1983). The court held that the statutory scheme of the revised

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drunk driving law (in Bohacheff, the specific statute at issue was § 940.25) did not offend the double jeopardy clause in allowing two charges and two guilty verdicts for what is essentially the same offense; double jeopardy concerns are sufficiently protected by the provision that only one conviction is possible. The court emphasized that the prosecution on two charges terminates with one conviction for all purposes.

While the Bohacheff decision resolved the double jeopary question raised by the two charge provision (at least in terms of it allowing only a single conviction, see 114 Wis.2d 402, 416, 418), it did not provide guidance to trial judges as to how a two-charge case is to be submitted to the jury.

When both theories of liability are submitted, should the jury be advised that they may return two guilty verdicts? Some instruction along those lines is inevitable, since the jury must at least be told to consider both charges. If told that two verdicts must be returned, should the jury be advised that even if the defendant is found guilty of both charges that they will be considered as one for the purpose of sentencing? The usual practice is not to advise the jury of the effect of their verdict, with the excepting of cased involving pleas of not guilty by reason of mental disease of defect.[18]

The Committee concluded that the jury should simply be instructed to consider both charges and return verdicts on each, just as they would be instructed in a regular two-count case. Thus, a guilty and a not guilty form of verdict wold be submitted for each charge. In the Committee's judgement, further explanation of the effects of two guilty verdicts is unwise, primarily because the effect of such advice is unpredictable. It may lead the jury to return two guilty verdicts

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more readily, under the assumption that the second will not make any difference. Or, it may lead the jury to return only one guilty verdict, based on the same assumption. The Committee determined that it was best to emphasize the jury's role as factfinder: there are two charges, and the jury's function is to find whether the facts support each of the two. When the jury returns two guilty verdicts, judgement should be entered on the verdict upon which the prosecutor moves for judgement. The charge to which the remaining verdict relates should be dismissed.

Of course, it is always possible that individual members of the jury will know nothing about the law as it applies to these cases. This is especially likely since the changes in the laws on this subject have been will-publicized and because many persons may have some experience with this type of case, being as common as it is. Thus, it seemed to the Committee that some confusion on this issue is inevitable whenever two verdicts are submitted. The Committee recommends that whenever the evidence clearly indicated that one theory of liability is more applicable than the other, only one charge be submitted. Prosecutors should be urged to submit only the strongest case of the two. This is desirable for the additional reason that if two counts are submitted and only one guilty verdict is returned, the verdicts may appear inconsistent. While such verdicts are not likely to affect the validity of a conviction on the one count,[19] it is difficult to explain why the jury could reach such a result when the same conduct is involved in each count and would be proven by the same evidence.

IV. The relevance and weight of test results

A. Section 885.235 as amended.

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One effect of the changes made by Chapter 20, Laws of 1981, was to repeal the former provision in § 346.63(4) which provided that "a person with .10% or more . . . is under the influence." Thus, under the new statutes, one must refer to § 885.235 to determine the relevance and weight of evidence of test results.

The provisions of Chapter 20, Laws of 1981, revised § 885.235 in such a way that it appeared that it did not apply to any of the new operating while intoxicated offenses. This defect was remedied by following legislation,[20] and the present version of § 885.235 is the statute which applies to the admissibility, relevance and weight of test results in cases under both the Motor Vehicle and the Criminal Code. The statute was revised again by 1983 Wisconsin Acts 74 and 459.

Under the present version of § 885.235, test results are admissible if the test was administered within three hours of the alleged driving. This is a change from within two hours under prior law. (Note: This may intensify the problems in connection with the "blood-alcohol curve," see discussion below.)

* * *

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